

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MANUEL D. ORELLANO,

Petitioner,

vs.

ROBERT LEGRAND, et al.,

Respondents.

Case No. 3:13-cv-00482-RCJ-WGC

ORDER

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#6), respondents' motion to dismiss (#11), and petitioner's response (#17). The court finds that petitioner has not exhausted his available state-court remedies for grounds 8, 9, and part of 4, and the court grants the motion.

After a jury trial in state district court, petitioner was convicted of four counts of lewdness with a child under the age of 14. Ex. 18 (#13). Petitioner appealed. The Nevada Supreme Court found that two of the counts were redundant and reversed them. The Nevada Supreme Court affirmed in all other respects. Ex. 25 (#13). The state district court then entered an amended judgment of conviction on two counts of lewdness with a child under the age of 14. Ex. 37 (#13). Petitioner then filed in state district court a habeas corpus petition and a supplement. Ex. 34, Ex. 39 (#13). The state district court denied the petition. Ex. 43 (#13). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 48 (#13). The federal habeas corpus petition (#6) followed.

Respondents argue that petitioner has not exhausted his state-court remedies for part of ground 4 and all of grounds 8 and 9. Before a federal court may consider a petition for a writ of

1 habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C.
2 § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's
3 highest court, describing the operative facts and legal theory, and give that court the opportunity to
4 address and resolve the ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam);
5 Anderson v. Harless, 459 U.S. 4, 6 (1982).

6 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state
7 remedies only if he characterized the claims he raised in state proceedings specifically as federal
8 claims. In short, the petitioner must have either referenced specific provisions of the federal
9 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th
10 Cir. 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law
11 that applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153,
12 1158 (9th Cir. 2003) (en banc). “The mere similarity between a claim of state and federal error is
13 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles,
14 such as due process, equal protection, and the right to a fair trial, are insufficient to establish
15 exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

16 Ground 4 has two parts, and respondents argue that ground 4(1) is unexhausted. Ground
17 4(1) is a claim that the trial court deprived petitioner of due process of law because it did not hold a
18 competency hearing before the minor victim testified. Respondents note correctly that petitioner
19 did not present this as an issue of federal law on direct appeal. Most of the cases that petitioner
20 cited involved only state law. See Ex. 22, at 12-16 (#13). Petitioner did cite one decision of the
21 Supreme Court of the United States, Wheeler v. United States, 159 U.S. 523 (1895). Ex. 22, at 13-
22 14. However, the Supreme Court did not make any constitutional rulings in Wheeler. That case
23 was an appeal from a criminal conviction in a lower federal court, and the Supreme Court was
24 acting in its supervisory role over that court. Petitioner has not presented a federal-law issue
25 regarding ground 4(1) to the state courts, and it is unexhausted.

26 In ground 8, petitioner argues that he was deprived of due process of law because of two
27 errors in jury instructions. First, he claims that a instruction that a victim's testimony need not be
28 corroborated is inapplicable in lewdness cases. Second, he claims that the instruction defining

1 lewdness incorrectly stated that each individual touching was punishable as a separate act.

2 Petitioner presented similar grounds to the Nevada Supreme Court on direct appeal, but he litigated
3 them only as issues of state law. See Ex. 22, at 21-22 (#13). Ground 8 is unexhausted.

4 In ground 9, petitioner argues that he was deprived of due process of law because of
5 prosecutorial misconduct. First, the prosecutor commented on petitioner's decision not to testify at
6 trial. Second, the prosecutor commented on the reasonable-doubt standard. Petitioner presented
7 similar grounds to the Nevada Supreme Court on direct appeal, but he litigated them only as issues
8 of state law. See Ex. 22, at 23-24 (#13). Ground 9 is unexhausted.

9 Petitioner's response (#17) argues that the court already determined that these grounds were
10 exhausted. The court has screened the petition for grounds that were without merit on their faces,
11 but the court has made no determination, until now, that his grounds were exhausted. See Order
12 (#4). In the alternative, petitioner asks the court to dismiss the grounds that it finds are
13 unexhausted, which the court will do. See Response, at 3 (#17).

14 Petitioner has filed a motion for enlargement of time (#18). He appears to be asking for
15 more time to file a reply to the answer, but respondents have not yet filed an answer. In any event,
16 the motion is made moot by the briefing schedule in this order, below. If petitioner needs additional
17 time beyond what is scheduled, he may file a new motion for enlargement of time.

18 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#11) is **GRANTED**.
19 Grounds 4(1), 8, and 9 are **DISMISSED** from this action for failure to exhaust the available state-
20 court remedies.

21 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from the date
22 of entry of this order to file and serve an answer, which shall comply with Rule 5 of the Rules
23 Governing Section 2254 Cases in the United States District Courts. Petitioner shall have forty-five
24 (45) days from the date on which the answer is served to file a reply.

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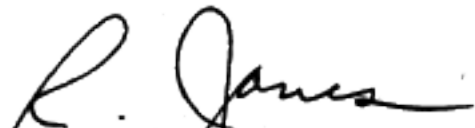
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1 IT IS FURTHER ORDERED that petitioner's motion for enlargement of time (#18) is
2 **DENIED** as moot.

3 Dated: March 24, 2015.

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6 ROBERT C. JONES
United States District Judge
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